STATE OF MICHIGAN

COURT OF APPEALS

GLENN WHEATONN,

Plaintiff/Counter-Defendant-Appellant,

v

GEICO GENERAL INSURANCE COMPANY,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
March 23, 2006

No. 265338
Wayne Circuit Court
LC No. 04-413356-NF

Before: Owens, PJ, and Kelly and Fort Hood, JJ

PER CURIAM.

Plaintiff-counter-defendant (plaintiff) appeals as of right the trial court's judgment granting defendant-counter-plaintiff (defendant) summary disposition, rescission, and restitution on an insurance policy issued to plaintiff. This case arose in Missouri when the parked pickup owned by plaintiff's employer, in which plaintiff was sitting, was struck by a delivery truck that was backing up. We affirm.

According to a California Department of Motor Vehicles (DMV) Application for Title or Registration apparently bearing plaintiff's signature, plaintiff became a California resident in September 1989. According to defendant's statement of account, plaintiff first purchased an insurance policy from defendant in July 2000; the insurance policy was rated for California. Plaintiff stated he moved from California to Detroit sometime in 2000. He added a 1987 Dodge to the California-rated insurance policy in July 2001.

Plaintiff stated that he drove to California in December 2001; while he was visiting in California, his Michigan license plates were stolen, so he had to register the 1987 Dodge in California in order to drive back to Michigan. He claimed that he changed the registration from California to Michigan as soon as he returned to Michigan. According to defendant's management notes, plaintiff had a loss in the 1987 Dodge in Michigan on April 21, 2002. Plaintiff submitted a policy questionnaire to defendant in May 2002 indicating that the 1987 Dodge was registered and located in California and was only driven on weekends. The questionnaire also indicated that plaintiff owned a 1989 GMC that was registered in Michigan. Certificates of insurance indicated the 1987 Dodge was covered by Michigan no-fault insurance from July 20, 2001 to January 20, 2003.

Sometime in 2002, plaintiff began working Mondays through Thursdays in Missouri as a construction worker for his cousin's husband. During this same period, he drove his vehicles as delivery vehicles on Fridays and Saturdays in Detroit for his nephew. On September 26, 2002, while plaintiff was sitting in a parked 1996 Dodge Ram, a delivery truck backed into the pickup; neither vehicle was towed from the accident, and both plaintiff and the driver of the delivery truck stated they were uninjured and refused medical treatment. About one week after the accident, however, plaintiff began seeing several doctors for a myriad of complaints. According to defendant's management notes, on November 14, 2002, plaintiff submitted an emergency road service claim for the 1987 Dodge that occurred in Illinois. Plaintiff's California registration for the 1987 Dodge indicated it expired November 26, 2002.

According to defendant's records, plaintiff's insurance was changed from California-rated to Michigan-rated in November or December 2002. Defendant's management notes indicated that the insurance was not to be rated for California or any other state without approval from "REUND" and not to reissue insurance if the policy was cancelled. On December 19, 2002, plaintiff informed defendant he was moving back to California. On January 7, 2003, plaintiff called to find out why his vehicles were rated in Michigan and stated he did not reside in Michigan but had only stayed in Michigan since the September accident because he was under a doctor's care. On January 26, 2003, plaintiff's policy was cancelled effective January 13, 2003, for nonpayment.

In connection with the September 2002 accident, defendant paid $19,173.12 in medical bills, $42,452.62 in lost wages, and $5,380 in replacement services for a total of $67,005.74, before subjecting plaintiff to independent medical examinations (IMEs). Three IMEs indicated no medical evidence of physical injury, organic illness, or need for further treatment. Defendant refused to pay medical bills incurred after the dates of the IMEs. Plaintiff sued the insurance company that insured the trucking company and apparently recovered a settlement of $22,500.

Plaintiff filed suit against defendant alleging that it refused to pay benefits after receiving proof of loss. Defendant counter-sued for reimbursement of mistakenly paid benefits or, alternatively, recoupment from any amount recovered by plaintiff in tort. Rehab Solutions and Associates, Inc., one of plaintiff's medical care providers, also filed suit, and the cases were consolidated.[1] Defendant moved for summary disposition arguing there was no issue of material fact that plaintiff misrepresented the location and use of the 1987 Dodge, plaintiff was not a named insured on any Michigan policy, defendant did not owe first party benefits to plaintiff, defendant was entitled to rescind the policy because of material misrepresentations, and defendant was entitled to recoup the previously paid benefits.

Plaintiff responded that defendant was aware of plaintiff's residence and the location of his vehicles because of an earlier claim in 2002 as well as the fact that defendant had mailed bills to plaintiff at his Michigan address for years before the September accident. He claimed he was unaware of the benefits of the insurance policy he purchased. Moreover, he asserted that

---

[1] Although Rehab filed a response to defendant's motion for summary disposition, it did not appeal the court's grant of summary disposition.

defendant never denied that the 1989 GMC was in Michigan or that defendant had issued a Michigan policy of insurance; he indicated on the policy questionnaire that the 1989 GMC was registered in Michigan and he lived in Michigan; and because defendant issued him a Michigan certificate of no-fault insurance, the benefits were properly paid.

Defendant replied that plaintiff failed to address whether he made material misrepresentations and, thus, conceded the issue. It pointed out that plaintiff's claim that defendant knew the true location and use of the 1987 Dodge was based on circumstances that occurred before plaintiff submitted the May 30, 2002 policy questionnaire. It argued that when the Dodge was inspected for damage on April 22, 2002, the Dodge had California license plates. It further argued that it had no duty to discover plaintiff's intentional misrepresentations, and plaintiff was responsible for maintaining proper insurance. The trial court granted defendant summary disposition on the ground that the policy questionnaire had many inaccuracies or misrepresentations. It granted rescission of the policy as of the date on the questionnaire and granted restitution for any amounts paid after rescission. Plaintiff's motion for reconsideration was denied.

Plaintiff first argues the court erred in finding no genuine issues of material fact existed with respect to discrepancies in the insurance policy questionnaire and, thus, in granting defendant summary disposition and rescission. We disagree.

A trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76-77; 597 NW2d 517 (1999). If, after viewing the submitted admissible evidence in a light most favorable to the nonmoving party, it is determined that no genuine issue of material fact existed, then the court properly granted summary disposition. *Id.* at 76. Whether a plaintiff is entitled to personal injury protection (PIP) benefits is determined under provisions of the no-fault act, MCL 500.3101 *et seq*. *Rohlman v Hawkeye-Security Ins Co (On Remand)*, 207 Mich App 344, 348; 526 NW2d 183 (1994). MCL 500.3111 provides in relevant part that PIP benefits may be paid to a person for injury incurred in an accident occurring outside of Michigan if the injured person is a named insured under a PIP policy. If there is no insurance policy, it is axiomatic that an individual cannot be a named insured under the nonexistent policy. See *Auto-Owners Ins Co v Johnson*, 209 Mich App 61, 65; 530 NW2d 485 (1995) (an insurer is not responsible for losses incurred before the insurance policy came into effect).

Here, the trial court rescinded plaintiff's policy with defendant effective May 30, 2002. When an insurance policy is rescinded, it is considered void from its inception. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). Generally, an insurance policy may be rescinded on the ground that a material misrepresentation was made in the application for insurance. *Lash, supra* at 103. In the instant case, neither party provided plaintiff's original application for insurance. However, this ground appears to encompass misrepresentations by an insured in response to questionnaires submitted to verify information contained in the application. See *Lake States Ins Co v Wilson*, 231 Mich App 327, 330, 333-334; 586 NW2d 113 (1998). To support its motion for summary disposition, defendant submitted a May 30, 2002 policy questionnaire filled out by plaintiff indicating that the 1987 Dodge was registered in California, located in California, and not used for a business purpose.

Defendant also submitted plaintiff's deposition testimony in which he admitted he had a California driver's license rather than a Michigan license even though he moved to Michigan in 2000, and the 1987 Dodge van was registered in Michigan and used for business purposes to deliver goods in Michigan. Hence, plaintiff misrepresented the information in the policy questionnaire. A misrepresentation is material if it would affect an insurer's decision whether to accept the risk of insuring the applicant or what premium to charge. *Keys v Pace,* 358 Mich 74, 82; 99 NW2d 547 (1959). Defendant argued that the misrepresentations in the questionnaire were material because they caused defendant to charge plaintiff less in premiums.

In response, plaintiff argued that he had a certificate of Michigan no-fault insurance covering the period during which the accident occurred, and it made no sense that defendant would issue a certificate of Michigan no-fault insurance but rate the policy for California. He claimed that the only time the vehicle was registered in California to a California address was after someone stole the license plates from the vehicle while he was visiting his aunt in California. The California DMV application indicated plaintiff applied for a California registration in December 2001 even though his Michigan registration did not expire until August 2002, and, thus, supported plaintiff's version of events. However, according to defendant's management notes, plaintiff had a loss in the 1987 Dodge in Michigan on April 21, 2002; this established that the vehicle was in Michigan as early as April.

If the information on the policy questionnaire was correct – that the Dodge was registered and located in California – then defendant properly rated plaintiff's insurance for California, which did not include PIP benefits. If the information in the questionnaire was incorrect, then plaintiff materially misrepresented the information, and defendant was entitled to rescind the policy. In any event, plaintiff either misrepresented the location of the Dodge on the policy questionnaire or misrepresented his extent of coverage on his claim for benefits. An insurer is not estopped from raising the misrepresentation of the insured as a defense unless the insurer was actually aware of the misrepresentation. *Keys, supra* at 84-85. The misrepresentation need not be intentional. *Lash, supra* at 103. No duty is owed to the insured to investigate or verify representations or to discover intentional material misrepresentations. *Hammoud v Metro Ins Co,* 222 Mich App 485, 489; 563 NW2d 716 (1997), citing *United Security Ins Co v Comm'r of Ins,* 133 Mich App 38, 45; 348 NW2d 34 (1984). Therefore, the court properly granted defendant summary disposition and rescission.

While this does not explain, and no explanation was given, why defendant issued plaintiff a certificate of Michigan no-fault insurance for the 1987 Dodge and a California certificate of insurance for the 1989 Chevrolet in contravention of the policy questionnaire, we are not convinced that an explanation is relevant when plaintiff admitted in his reply to defendant's summary disposition motion that both vehicles were registered and located in Michigan – which indicated plaintiff materially misrepresented the location of one vehicle. In an attempt to explain, plaintiff merely argued, without supporting admissible evidence in his motion for reconsideration, that he intended to move back to California with the 1989 Chevy at the time he filled out the May 30, 2002 policy questionnaire but later decided to take the 1987 Dodge to California instead and called to inform his insurance agent of this change. Plaintiff appears to argue on appeal that this plausible explanation raised a genuine issue of material fact sufficient to withstand summary disposition. However, plaintiff's argument fails for several reasons.

First, there was no evidence, in the form of testimony, affidavits, or otherwise to support plaintiff's explanation. The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002), and speculation and conjecture are insufficient, *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005). An explanation that is consistent with known facts but not necessarily deductible from them is mere conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Moreover, a party may not leave it to this Court to discover the factual basis for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Second, plaintiff's actions of remaining in Michigan and working in Missouri belie his explanation. A party cannot create a factual issue by making conclusory statements that contradict his actual historical conduct. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004). Third, plaintiff did not raise this explanation before the trial court granted summary disposition. An adverse inference may be drawn against a party who fails to produce evidence within its control. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989). Further, a trial court does not abuse its discretion when it denies a motion for reconsideration, which rests on evidence that could have been raised the first time the issue was argued. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Hence, plaintiff's argument in this regard has no merit.

Plaintiff next argues the court erred by failing to allow him to contest or set off the amount of benefits defendant claimed it paid. We disagree.

Plaintiff did not seek to set off premiums or other amounts from the court's award to defendant of benefits paid. Therefore, this issue is not preserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Issues raised for the first time on appeal need only be considered if failure to consider them would result in manifest injustice. *Polkton Twp, supra* at 95-96. Manifest injustice occurs if plain error is of such consequence that it would require a new trial or if it involves a basic and controlling issue. *Internat'l Union, UAW v Dorsey*, 268 Mich App 313, 324; 708 NW2d 717 (2005). In addition to failing to preserve his argument at trial, plaintiff does not cite any authority to support his argument on appeal.

With respect to plaintiff's pleaded defenses, plaintiff merely denied the allegation that defendant mistakenly paid $67,005.74 in no-fault benefits. Defendant provided a register-payment record indicating it had paid the alleged amount. Plaintiff's general assertion that defendant's claim was untrue was insufficient to create a genuine issue of material fact with respect to the amount of benefits paid. Moreover, plaintiff does not on appeal provide an amount of set off to which he considers himself entitled. Therefore, we consider this insufficiently briefed and factually unsupported issue abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood